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WITH the present number the HARVARD LAW REVIEW begins the fourth year of its existence. Reassured by the success of the past three years, and by the manifest good-will and hearty encouragement of the friends and alumni of the School, the editors feel that the REVIEW is rapidly outgrowing the experimental stage of its life; and are led to believe more and more strongly that it has a place to fill as the organ of the characteristic work of the Harvard Law School. The ever-increasing success and influence of that work should be, and we believe are, matters of deep interest among the advocates of that system, and to spread more widely its best results is the first aim and purpose of the REVIEW. To this end we ask the continued support and co-operation of all friends of the School, and more especially of the members of the Harvard Law School Association.

The general plan of the REVIEW will be the same as in previous years, and about the same relative proportions will be preserved between the several departments. The high standard of excellence which the leading articles have shown, leave little room for apprehension in that direction; especial pains will be taken to make the Notes as interesting, and the Recent Cases as exhaustive, on all important points, as possible. We trust that the results of our endeavors in the future may show as steady an advance of the REVIEW in legal favor as have those of former editorial boards.

WE have heard with great regret of the resignation of Professor William A. Keener to accept a chair at the Columbia Law School. Professor Keener graduated at the Harvard Law School in 1877; in 1883 he was appointed assistant professor for five years, and at the end of this term, in 1888, he accepted the Story professorship. The students who have attended the School during the past seven years will not easily forget his unvarying kindness, his clear and suggestive method of teaching, and the interest and enthusiasm for his subject

which he always aroused in his classes. His departure must be felt with regret by all who have the interest of the School at heart, and to this is added a sense of personal loss among those who had hoped to have the benefit of his further instruction.

THE recent cases on "trusts" suggest, among other more important things, the question whether it is material that the subject-matter of the "trust agreement" be an article of necessity. In the case of the *People* v. *The North River Sugar Refining Co.*,[1] some twenty cases are cited, and the result summed up in the following sentence: "In all these cases, the reservation of the power to control the prices of necessary products, whether by express agreement or fair implication, has been condemned as unlawful." In *Dolph* v. *Troy Laundry Co.*,[2] moreover, one of the reasons for holding a contract between two rival traders fixing a scale of prices, legitimate, was that washing-machines are not articles of necessity.[3]

In discussing the differences between a monopoly of a necessary and that of a non-necessary (if we may be allowed such a term), one must look at the question both from the side of the monopolist and from that of the public. Of course, the object of a monopolist is to raise prices, and thus enrich himself at the expense of the public. Now, it is undoubtedly true that, as prices are raised in the two cases we are considering, the quantity of the non-necessary demanded by the public will fall off much more rapidly than that of the necessary. In other words, a man cannot make so much money out of the former, because his sales must be more limited than would be the result in case of an equal rise in the price of the latter. Therefore, the monopolist cannot gain so much at the expense of the public; but does it follow that the public's real loss is less by the same amount that the monopolist's gain is less?

We must not forget that the man who ceases to buy an article because of the rise in price, or one who does not buy so much as he did at the lower price set by competition, suffers a loss as well as the man who buys the same amount as before but at a higher price. In the case of the non-necessary, more people prefer to take the loss by going without the article than in the case of the necessary; that is, the same proportion of the loss does not materialize in the form of gain to the monopolist in the former as in the latter case.

We do not mean to imply that the loss is as hard to bear in the one case as in the other, or that it will be to the interest of the monopolist to raise prices to the same extent in both cases; but we do wish to point out that there is injustice to the public in the one case as in the other, and that the ordinary method of measuring the amount of the injustice by the amount of the monopolist's gain has a tendency slightly to exaggerate the difference in hardship to the public between the two kinds of monopoly. No doubt there is a difference, but it is a difference merely in degree.

Turning to the reports, we find that in *The Case of the Monopolies*,

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[1] 7 N. Y. Sup. 406, at pp. 412, 413.
[2] 28 Fed. Rep. 553.
[3] It was also held that the contract fell short of an attempt to create a monopoly, a ground which of itself would seem sufficient to support the decision entirely irrespective of the question of necessity.
[4] 11 Coke, 84.

a monopoly of the manufacture and sale of playing-cards, granted to an individual by Queen Elizabeth, was held void at common law. There would seem to be no reason for drawing a distinction on this point between a monopoly granted by the State and one acquired by an individual or group of individuals. Moreover, the maxim "Competition is the life of trade" (a maxim which seems to measure with some degree of accuracy the extent to which the law takes notice of political economy), undoubtedly covers the manufacture and sale both of necessaries and non-necessaries.

Upon the whole, it is much to be doubted whether the decision in the New York case would have been different if the "trust" had been for the manufacture of playing-cards instead of the refining of sugar. The particular case before the court was the monopoly of an article of necessity, and we must conclude that only the cautious habit of not deciding more than needful for the disposition of the case in hand led the court apparently to lay down what would seem to be an unnecessary limitation.

GOVERNOR HILL'S recent message to the New York Legislature, suggesting that the opinion of the Court of Appeals be taken on the constitutionality of the Saxton Ballot Reform bill is interesting. Washington made a similar attempt to get the opinion of the Supreme Court of the United States in 1793, but the judges refused, regarding the task of answering such questions as not within the scope of their judicial duties.[1] It is not improbable that this example would have been followed by the Court of Appeals, if the Legislature had acceded to Governor Hill's request. Such an interpretation of the court's duties would seem at least to be the correct one, in the absence of constitutional provisions, such as exist in Massachusetts and some other States, requiring opinions from the judges.

In this connection the action of the Supreme Court of Minnesota in 1865[2] is worth noticing. Questions were put to that court by the senate, under a statute making it the duty of the judges to answer in such a case at the request of either house. The court, however, declined to give an opinion, on the ground that the statute was unconstitutional as imposing duties not properly judicial or to be performed in a judicial manner, and that it would be improper to answer voluntarily. Similar statutes calling for advisory opinions from the judges may be found in Vermont[3] and — in a limited class of cases — in New York.[4] Governor Hill mentions as precedents for the action which he recommends, the former Council of Revision in New York, and an opinion given by the Court of Appeal in 1872. The circumstances of the latter case do not appear; but the Council of Revision was established by the Constitution,[5] and is therefore no precedent for a voluntary answer. An instance of such an answer by the Supreme Court of New York in 1846 may, however, be found in the Debates in the Massachusetts Convention of 1853.[6]

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[1] Marshall's Life of Washington (Am. ed.), v. 441. See a "Memorandum on the Legal Effect of Opinions given by Judges," by Professor Thayer.

[2] *In the matter of the Application of the Senate*, 10 Minn. 78. See supplementary note to Professor Thayer's pamphlet.

[3] Revised Laws of Vermont, 1880, s. 795.

[4] Revised Statutes, part iv. tit. 1, s. 14; see *People* v. *Green*, 1 Den. 614. For an opinion based on a similar statute in Pennsylvania, see *Report of the Judges*, 3 Binney, 598 (1808).

[5] Const. of 1777, iii.

[6] I. 138; also in Jameson's Constitutional Conventions, App., 663.

IN the case of *Brennan* v. *Brighton Beach Racing Association*,[1] the General Term of the New York Supreme Court has just decided that a person who buys a pool ticket on a race-course can enforce the contract at law.

The plaintiff in this case had bought twenty pool tickets on a certain horse, which proved to be a winner. He demanded his winnings, amounting to about $750, from the seller of the pool, who, for some reason, refused to pay. Brennan thereupon brought suit to enforce payment. In the lower court the judge dismissed the suit, on the ground that the contract being a gambling transaction was void. Against this decision the plaintiff appealed, with the result above stated.

The decision is based on the so-called Ives' pool bill, which was passed in 1887. The court says, that before that time the transaction would have been unlawful; but the law then passed, among other provisions, regulates the times and places at which pools may be sold during the racing season. From this it appears that the Legislature intended to legalize such sales. "They are neither forbidden nor condemned, but they are regulated. There would have been no sense nor reason in declaring that pool-selling should be confined within the period mentioned, and to the places designated, unless it was intended to sanction the right of the association to make such sales."

We cannot agree with some of the daily papers that by this decision the court have given an effect to the law which is opposed to the intention of the Legislature which passed it. Section four of the law provides for the suspension of sections 351 and 352 of the Penal Code during the days on which racing is authorized, and, also, "that pool-selling shall be confined to the tracks where the racing takes place, and to the days of the races." At other times and places pool-selling shall be severely punished. The suspended sections of the Penal Code make it a crime to sell pools, or in any way to aid in betting, or to race a horse for money. The only reasonable interpretation of these provisions is, that, at the times and places mentioned, pool-selling is to be lawful. In the case before us the pool tickets represented a contract which is good in substance, but which the courts have refused to enforce, as being contrary to law. The Legislature expressly says that at certain times and places such a contract shall no longer be contrary to law. On what ground, then, can the court refuse to enforce it? Under the law as framed it would seem that no other decision could well have been reached.

THE following paragraph appears in the "Law Quarterly" for January:[2] "It is to be regretted that so eminent a judge as Fry, L. J., should be reported as calling the citation of American authorities 'waste of time.' (*Re Missouri Steamship Co.*, 42 Ch. Div. 330.)[3]

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[1] See the "New York Herald" of March 15, 1890.

[2] Vol. 6, p. 122.

[3] Lord Halsbury (interrupting counsel): "We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice, which seems to be increasing, of quoting American decisions as authorities, in the same way as if they were decisions of our own courts, is wrong. Among other things it involves an inquiry, which often is not an easy one, whether the law of America on the subject in which the point arises is the same as our own." Fry, L. J.: "I also have been struck by the waste of time occasioned by the growing practice of citing American authorities." Cotton, L. J.: "I have often protested against the citation of American authorities."

If they are irrelevant, or mere repetition of what is already in English authorities, the citation of them is of course a waste of time; so is the citation of irrelevant English authorities; but if they are relevant, they may be of the highest value, not only for the intrinsic excellence of the judgments, monuments often of industry, learning, and genius, but as independent commentaries on the principles of the English common law or equity developing under new conditions among a 'noble and puissant nation.' Lord Halsbury was of course quite right in declining to receive them as of equal authority with the decisions of our own courts; but this is no disparagement to their juristic excellence, which, for the rest, has been many times acknowledged from the bench in reported judgments and dicta."

THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

FORBEARANCE TO SUE AS CONSIDERATION FOR A PROMISE. — (*From Prof. Keener's Lectures.*) — The essence of consideration is detriment to the plaintiff. The plaintiff has suffered detriment when he has *given up a right.* Therefore, whenever one has *a right* to sue, forbearance is a good consideration.

Now, when does one have *a right* to sue? There are three possible views.

(*a*) One view is that a man can invoke the aid of the law only when he has a good cause of action. He has no right to come into court unless he can succeed. The province of the court is simply to protect rights.

(*b*) The second theory gives a man a right to appear when the case is really doubtful, either in law or in fact. He can come into court and find out the truth of the matter. The court is an arbitrator to settle differences.

(*c*) A third idea is that any man can appear in court who *honestly believes* that he has a cause of action. The court is bound to give a hearing to every man who appears *bona fide.*

Historically the first view is correct. For a party coming into court has to succeed or pay costs. Costs are regarded as compensation for the wrong done to the opposite party in invoking the aid of the law against him without any good cause of action. And in early times a defeated suitor had to pay a fine to the king in addition to the costs of the action.[1]

The third view, however, is that on which the English courts act.[2] *Callisher* v. *Bischoffsheim*[3] stands in England to-day for the proposi-

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[1] Bacon, Abr., title Fines and Amerciaments, c; *Beecher's Case,* 8 Coke, 61.
[2] *Miles* v. *New Zealand Co.,* 32 Ch. Div. 266.
[3] L. R. 5 Q. B. 449.